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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. ~~562~~ 22

TIME, INC.,

Appellant,

—against—

JAMES J. HILL,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

This brief is submitted in response to the motion to dismiss or affirm filed by appellee. It is prompted by the counterstatement of the question presented and the counterstatement of the facts contained in the motion.

1. *Facts.* Appellee's highly argumentative statement of facts attempts to litigate matters that are no longer in the case or that were never in it. The effort to ward off federal review of this direct appeal should not becloud the underlying constitutional question. That question emerges starkly upon examination of the majority and concurring opinions in the Appellate Division on the one hand and the dissenting opinions in the two appellate courts below on the other. Those opinions did not disagree on the facts but rather on the significance to be drawn from appellant's error in describing "The Desperate Hours" as a reenactment of the actual incident involving appellee and his family. None of the opinions, including the two in

appellee's favor, found or even suggested that appellant was malicious or recklessly oblivious of the truth, nor did any of them find or suggest that there was less than a substantial connection between the play and the prior incident.*

Appellee has gone far beyond the opinions below rendered in his favor by asserting, without benefit of record reference, that this is a case based upon malice or reckless disregard of the truth. For example, the motion to dismiss or affirm refers to a "deliberately fabricated and basically false magazine article" (p. 1), "concocting a fiction" (p. 4), "the spurious connection of appellant [*sic*] with The Desperate Hours" (p. 4), "it knew this [a similarity between the play and the prior incident] was not so" (p. 10), "the Life article was a deliberate commercial fiction" (p. 10), "despite his [the editor's] knowledge that there was no real connection between the two" (p. 10), "that connection [identfication of the Hill family with the play] was false and known to be false by all concerned" (p. 11), "Life was faced with the problem that the play bore no true relationship to a single real-life person or event" (p. 12), "a fabrication" (p. 13), "the relationship of the appellee and his family to The Desperate Hours was deliberately falsified . . ." (p. 13), "solely to fabricate an imaginary relationship . . ." (p. 19), and, finally, "fabricated photo-article" (p. 21).

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*As appellant pointed out in its jurisdictional statement (pp. 19-20), throughout the courts below it argued strenuously that the article in suit was essentially accurate and one that could not properly be described as fictionalized. It also argued that it was entirely justified in believing the author considered his play to be a reenactment of the prior incident. Because of the majority opinion of the Appellate Division, however—where it was found that the play was not a reenactment and where it was suggested that appellant was negligent in not pinning this point down with certainty (Appendix B, pp. 4b, 5b)—appellant abandoned its efforts with respect to those two remaining areas of factual dispute. Hence, it adopted the statement of facts in the majority opinion of the Appellate Division, conceding both inaccuracy and negligence (pp. 5-6, 19-20).

Not only does this charge of "fabrication" and "concoction" fly in the face of the entire record and any common sense comparison of the news reports of the actual incident and the play, it is directly contrary to the holding below. Indeed, the concurring opinion in the Appellate Division, specifically affirmed by the court below, was at pains to point out that "properly presented, the Hill incident could have been referred to in the article reviewing the play without subjecting the defendant to liability despite the fact that to do so would constitute an invasion of the Hills' privacy and might cause them grief and distress" (Appendix B, p. 7b). The majority and concurring opinions in the Appellate Division objected to the manner of presentation which, in their view, placed primary rather than incidental emphasis upon the prior incident and described the play as a reenactment when it was not. As a result, in their view, stress laid upon the connection between the play and the incident converted otherwise newsworthy material into an advertisement for the play which would increase circulation of the magazine (Appendix B, pp. 4b, 8b). It is in that context that the question raised here is presented. That context, which embraces appellant's constitutional argument and the distinction between the two sets of opinions below, is simply ignored by appellee.

The motion to dismiss or affirm is probably a good example of what can happen to a publisher in the absence of constitutional protection. There is no dispute that appellant's article was "deliberately" written and that, by appellant's concession, the article was partially inaccurate. Nor is there any dispute that appellant desires to sell its magazines. Thus, wherever an error occurs, however innocent, it can be attacked as a "deliberate fabrication," and the publisher subjected to criminal and civil liabilities for invasion of privacy, even where, as in the present case, praise was bestowed on appellee by appellant's reference to

"a heart-stopping account of how a family rose to heroism in a crisis." (R. 18-20). In light of the opinions below and the lack of support in the record, appellant should not have to answer the charge of malice. Nevertheless, the following is offered to elaborate upon the basic facts that are set forth in the various opinions below.*

Tom Prideaux, who wrote the Life article, had read widely of the Hill incident at the time that appellee's statement first appeared in the press (R. 193-94, 219-20). He later recognized the remarkable similarities between that incident and "The Desperate Hours" (R. 220-21). The play was brought to his attention during a luncheon conference, regarding another subject, with the producer, Robert Montgomery, who suggested that the play with its unusual stage setting would be an interesting subject for an article in Life (R. 186-87). At a subsequent conference, Montgomery disclosed to Prideaux that a real-life incident was involved (R. 189).

Later, Prideaux had a brief discussion with Bradley Smith, a free-lance photographer, who also brought up the possibility of publishing an article about the play and stated that it "had a substantial connection with a true-life incident of a family being held by escaped convicts near Philadelphia" (R. 190). Smith told Prideaux that he was a friend and neighbor of the author of the play, Joseph

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*Because of the views expressed in the majority and concurring opinions in the Appellate Division, it seemed clear that appellant's jurisdictional statement need only be concerned with the question of negligence or failure to make a sufficiently diligent investigation. For that reason, the question of malice or reckless disregard of the truth was not discussed. Appellee, however, in addition to the factual allegations discussed above, has taken the next step and asserted that the rule of *New York Times* v. *Sullivan*, 376 U. S. 254, cannot apply to the present case because of appellant's "indifference to the falsity of the connection it made between appellee and 'The Desperate Hours'" (p. 21). As we have said, the underlying allegation of knowing or reckless falsity (and, indeed, of complete falsity as opposed to some inaccuracy) is unsupported in the record, and hence the argument is without merit.

Hayes, and indicated that his information had come from Hayes himself (R. 190).

Thereafter, Prideaux noted a report that the play was trying out in Philadelphia and realized that there might be a possibility of an off-stage setting (R. 193). He telephoned Hayes in Philadelphia to discuss that possibility (R. 194, 196). Hayes stated that he was interested in the idea and, in response to Prideaux's question, confirmed "that there had been an incident in Philadelphia" (R. 121, 160). Hayes agreed to contact the current occupants of the house where that incident had occurred and arrange for an appointment between them and Prideaux (R. 121-22, 124). In accordance with the arrangements subsequently made by Hayes, Prideaux traveled to Philadelphia, conferred with Hayes, went with him to the former residence of the Hills, and negotiated wth him and the occupants of the house for all photographic work that appeared in the article (R. 125-28).

By the time that Prideaux started work on the text of the article, he had seen the play twice, examined newspaper reviews of it, and compared it to the details of the actual incident as they had appeared in the press (R. 214-16, 219-20). Prideaux thus became satisfied that the story was newsworthy:

> "It seemed from the very beginning that this was an important news event in the entertainment field for reasons that I think we have talked about before, that it was a play based on a novel that was very well received. There was something quite unusual about it in that the movie had already been made and kept aside as the play was being developed. The production itself was of interest, as we stated, and when we were told about the connection with the Hill incident, that seemed to augment the interest of this whole production." (R. 265.)

Accordingly, he included a reference to the Hill incident:

> "Being told by a source, to begin with, which I trusted, namely, a friend and neighbor of Mr. Hayes, and by the fact that Mr. Hayes, who it seemed to me realized that we were closely connected with or were interested in this incident, was cooperating . . . our hope was to make this connection as part of the entire combination of events that made this an interesting news item." (R. 265.)

In addition, he believed in the substantiality of the relationship stated in the article between the incident and the play:

> ". . . a discussion [between Prideaux and Hayes] of the play itself, what the play was about, in the light of my own knowledge of what the true incident was about, confirmed in my mind beyond any doubt that there was a relationship, and Mr. Hayes' presence at this whole negotiation was tacit proof of that." (R. 197.)

The Life article was checked for accuracy by a researcher-reporter (R. 281-82). The researcher was given the drafts or so-called "checking copies" of the article and asked to verify its contents (R. 284, 297). She went to Philadelphia and saw the play, read the drama reviews, studied the newspaper accounts of the incident, and later placed a check mark over each word in the article to confirm her belief in its accuracy (R. 282, 285, 287-88). She also became satisfied that "The Desperate Hours" was based on the Hills' experience (R. 297-98). Her conclusion was supported by numerous and arresting points of similarity and coincidence between the two (Exs. 15, B, D; Appendix A, p. 3a; Appendix D, pp. 1d-3d).

The conclusions reached by the Life employees were shared by others. The Philadelphia Inquirer literary critic

commented at the outset of his review of the novel that "Philadelphia readers will recognize a slice of real life out of the fairly recent past" (R. 354). The drama critic for the Philadelpha Inquirer observed in reviewing the play that it was "based upon an actual incident" (R. 486). Many of the Hills' friends immediately connected "The Desperate Hours" with the incident (R. 75, 299-310). Appellee himself in two verified complaints prior to the complaint extant at the time of trial swore that the Hayes story was "based upon the actual occurrences of September 1952 in which plaintiffs Hill were involved" (R. 426, 463).

Despite the reference in the motion to dismiss or affirm to newspaper accounts of other hostage incidents (p. 5), none of them bore any resemblance to "The Desperate Hours" beyond the common hostage theme (R. 148, 152-61, 175-77).

2. *Argument.* The legal arguments advanced in the motion to dismiss or affirm require little comment. Representative is the statement contained in the first paragraph of point I of the motion (p. 15), having to do with the constitutionality of Sections 50 and 51 of the New York Civil Rights Law. Referring to those sections in terms of freedom of the press, the paragraph concludes with this statement: "The New York Privacy Law was held constitutional by this Court in *Sperry & Hutchison Co.* v. *Rhodes*, 220 U. S. 502 (1911)." That decision, of course, held no such thing, at least not in the context of the First Amendment question now presented. The Court simply held that it was not a taking of property without due process for New York to apply its new statute to the use of photographs made after the law went into effect. Mr. Justice Holmes concluded (at 505):

> ". . . the Fourteenth Amendment does not forbid statutes and statutory changes to have a begin-

> ning and thus to discriminate between the rights of an earlier and later time."

Similarly, the motion to dismiss or affirm derives little succor from its frequent references to Article 1, Section 8 of the New York State Constitution, which declares that "no law shall be passed to restrain or abridge the liberty of speech or of the press." Appellee's argument merely succeeds in convincing one that the New York State Constitution has also been violated. Indeed, it is difficult to perceive how Section 50, the criminal portion of New York's privacy law, does not on its face violate the New York Constitution, not to mention the provisions of the First Amendment:

> "A person, firm or corporation that uses for . . . purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person . . . is guilty of a misdemeanor."

It is noteworthy that appellee devotes not a word to Section 50 and its criminal restraint upon the press, although that section was expressly upheld by the court below (Appendix A, p. 1a).

Appellee's argument based upon prior New York decisional law in the field of privacy relies exclusively upon the common law "news privilege" (pp. 15-19). Appellant acknowledged in its jurisdictional statement (p. 10) that a number of New York decisions had extended protection to items in the press, apparently for non-constitutional reasons of policy. The point missed by appellee is that there has never been a constitutional rationale governing those decisions and on other occasions the New York courts have been equally willing to disregard mere policy limitations on the privacy tort. The examples cited (p. 9), *Binns* v. *Vitagraph Co.*, 210 N. Y. 51, 103 N. E. 1108 (1913), *Sutton* v. *Hearst*

Corp., 277 App. Div. 155, 98 N. Y. S. 2d 233 (1st Dep't 1950), and *Blumenthal* v. *Picture Classics,* 235 App. Div. 570, 257 N. Y. S. 800 (1st Dep't 1932), are not discussed in the motion to dismiss or affirm.

In any event, the present case represents a substantial deviation from whatever policy limitations have previously obtained, and it states the latest and most authoritative position of New York's highest court. As we said, if New York had chosen to follow the path outlined by Mr. Justice Shientag, who affirmed the "over-riding social interest in the dissemination of news," *Gautier* v. *Pro-Football, Inc.*, 278 App. Div. 431, 435, 106 N. Y. S. 2d 553, 557 (1st Dep't 1951), *aff'd,* 304 N. Y. 354 (1952), or that of Judge Clark in *Sidis* v. *F-R Pub. Corp.*, 113 F. 2d 806 (2d Cir. 1940), *cert. denied,* 311 U. S. 711, the present case would not be here now. It is precisely because the privacy field has never been subjected to constitutional scrutiny that the parties are today before the Court. That is the point appellee treats with silence, in a case in which the original award included punitive damages and upon which an indictment could now be predicated.

Finally, appellee declares that *New York Times* v. *Sullivan,* 376 U. S. 254, has no bearing on the present case (p. 20). Appellant, of course, never claimed that a public official was involved here. It did point out, however, that the *Times* decision was significant because it extended constitutional doctrine into the law of torts, at least where freedom of expression is concerned. Appellee has made no attempt to respond to that analysis. Furthermore, it is possible that the *Times* decision itself may be applicable to the present situation, especially in light of such cases as *Walker* v. *Courier-Journal,* No. 4639 (W. D. Ky. Sept. 23, 1965), where the rule was recently applied to a "public man." Appellee was a non-public man, but he was very much involved in a public event, later described in a non-defamatory report. Can it be fairly argued, in the absence of a prior constitu-

tional decision in the field of privacy, that the possible applicability of the *Times* decision to the present case does not present a novel and substantial federal question?

Apart from the *Times* case, appellee has not replied to the other reasons advanced in the jurisdictional statement as to why the requirement of substantiality has been more than satisfied under the First Amendment. Granted the opinions below favorable to appellee expressed the conclusion of law that "fictionalization" converted a news item into a publication "for the purpose of trade" (Appendix B, p. 8b), or, in appellee's words, a "commercial" writing (p. 20), but this ipse dixit does not make it so. Surely it cannot be so until first examined in the light cast by the Constitution.

CONCLUSION

The motion to dismiss or affirm should be denied and this Court should note probable jurisdiction of the question presented.

Respectfully submitted,

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